Supreme Court of the United States.

No. 174.—October Term, 1906.

Nicholas V. Halter and Harry V. Hayward, Plaintiffs in Error, *vs.* The State of Nebraska.	In error to the Supreme Court of the State of Nebraska.

[March 4th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

This case involves the validity, under the Constitution of the United States, of an act of the State of Nebraska, approved July 3d 1903, entitled "An act to prevent and punish the desecration of the flag of the United States." *

The act, among other things, makes it a misdemeanor, punishable by fine or imprisonment, or both, for any one to sell, expose for sale, or have in possession for sale, any article of merchandise, upon which shall have been printed or placed, for purposes of *advertisement*, a representation of the flag of the United States. It expressly excepted, however, from its

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*"§ 2375*g*. Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substanee on which so placed, or who shall publicly mutilate. deface, defile, or defy, trample upon or cast contempt, either by words, or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.

"§ 2375*h*. The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any

operation any newspaper, periodical, book, &c., on which should be printed, painted or placed a representation of the flag "*disconnected from any advertisement.*" 1 *Cobbey's Ann. Stat. Neb.* 1903, c. 139.

The plaintiffs in error were proceeded against by criminal information upon the charge of having, in violation of the statute, unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale a bottle of beer, upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States.

The defendants pleaded not guilty, and at the trial insisted that the statute in question was null and void, as infringing their personal liberty guaranteed by the Fourteenth Amendment of the Constitution of the United States, and depriving them, as citizens of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed by the Federal Constitution; also, that the statute was invalid in that it permitted the use of the flag by publishers, newspapers, books, periodicals, &c., under certain circumstances—thus, it was alleged, discriminating in favor of one class and against others. These contentions were overruled and the defendants having been found guilty by a jury were severally adjudged to pay a fine of $50 and the costs of the prosecution. Upon writ of error the judgments were affirmed by the Supreme Court of Nebraska, and the case has been brought here upon the ground that the final order in that court deprived the defendants, respectively, of rights specially set up and claimed under the Constitution of the United States.

It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the act, approved February 20th 1905, authorizing the registration of trade marks in commerce with foreign nations and among the States, it was provided that no mark shall be refused as a trade mark on account of its nature "unless such mark . . consists of or comprises the flag or coat of arms or other

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substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, or ensign, of the United States of America.

"§ 2375*i*. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, or any of which shall be printed, painted or placed, said flag, disconnected from any advertisement." 1 *Cobbey's Ann. Stat. Neb.* 1903, c. 139.

insignia of the United States, or any similation thereof or of any State or municipality or of any foreign nation." 33 *Stat.* 724, § 5.

The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the States of the Union have enacted statutes* substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied—*Ruhstrat* v. *People*, 185 *Ill.* 133; *People ex rel. McPike* v. *Van De Carr*, 178 *N. Y.* 425. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted by the Federal Constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the State and Federal Constitutions. In the other case, decided by the Court of Appeals of New York, the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution as depriving the owner of property without due process of law, and as taking private property for public use without just compensation.

In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or State, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people.

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* Ariz, Rev. Stat. 1901, p. 1295; Colo., 3 Mills Anno. Stat., vol. 3 Rev. Supp., 1891–1905, p. 542; Conn., Gen. Stat., 1902, p. 387; Cal. Stat., 1899, p. 46; Del., 22 Sess. Laws, p. 982; Hawaii, Sess. Laws, 1905, p. 20; Idaho, Sess. Laws, 1905, p. 328; Ill., Sess. Laws, 1899, p. 234; Ind., Acts, 1901, p. 351; Kans., Gen. Stat., 1905, p. 499, § 2442; Me., R. S., 1903, p. 911; Md., Laws, 1902, p. 720; Mass., 2 Rev. Laws, 1902, p. 1742; Mich., Pub. Acts, 1901, p. 139; Minn., Rev. Laws, 1905, § 5180; Mo., 2 Anno. Stat., 1906, § 2352; Mont., Laws, 1905, p. 143; N. H., Pub. Stat., 1901, p. 810; N. J., Laws, 1904, p. 34; New Mex., Laws, 1903, p. 121; N. Y., Laws, 1905, vol. 1, p. 973; N. Dak., Laws, 1901, p. 103; Ohio, Laws, 1902, p. 305; Ore., Gen. Laws, 1901, p. 286; R. I., Sess. Acts, Jan. & Dec, 1902, p. 65; Utah, Laws, 1903, p. 29; Vt., Laws, 1898, p. 93; Wis., Laws, 1901, p. 173; Wyo., Laws, 1905, p. 86.

Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States or that it relates to a subject exclusively committed to the National Government. From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

It may be said that as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede State laws of like character, it does not follow that in the absence of national legislation the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of national legislation, the States may exert some control in the interest of its own people. For instance, it is well established that in the absence of legislation by Congress a State may, by different methods, improve and protect the navigation of a waterway of the United States wholly within the boundary of such State. So, a State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the State encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it.

By the statute in question the State has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the Nation. Such an use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a State enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that any one has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law and subject to the power of Government to prohibit its use for purposes of advertisement.

Looking then at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of any one. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Another contention of the defendants is that the statute is unconstitutional in that, while applying to representations of the flag placed upon articles of merchandise for purposes of advertisement, it does not apply to a newspaper, periodical, book, pamphlet, &c., on any of which shall be printed, painted, or placed the representation of the flag disconnected from any advertisement. These exceptions, it is insisted, make an arbitrary classification of persons which, in legal effect, denies to one class the equal protection of the laws.

It is well settled that when prescribing a rule of conduct for persons or corporations a State may, consistently with the Fourteenth Amendment, make a classification among its people based "upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 *U. S.* 150, 159–60, 165. In *Cotting* v. *Kansas City Stock Yards Co.*, 183 *U. S.* 79, there was a difference of opinion in the court as to what was necessary to be decided, but all agreed that a State enactment regulating the charges of a certain stock yards company, and which exempted other like companies from its operation, was a denial of the equal protection of the laws and forbidden by the Fourteenth Amendment. In *Connolly* v. *Union Sewer Company*, 184 *U. S.* 540, 552, 562–3–4, the question arose as to the validity, under the equality clause of the Constitution, as to the validity of a statute of Illinois, forbidding, under penalty, the existence of combinations of capital, skill or acts for certain specified purposes, but exempting from its operation agricultural products or live stock while in the hands of the producer. By reason of this exemption the statute was adjudged to operate as a denial of the equal protection of the laws, and was, therefore, void. The court observed that such a statute was not a legitimate exertion of the power of classification, rested upon no reasonable basis, was purely arbitrary, and therefore denied the equal protection of the laws to those against whom it discriminated. It said: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The present case is distinguishable from the *Connolly* case. The classification there involved was of persons alike engaged in domestic trade, which trade, the court said, was of right "open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe." Now, no one can be said to have the right, secured by the Constitution, to use the country's flag merely for purposes of advertising articles of merchandise. If every one was entitled of right to use it for such purposes, then, perhaps, the State could not discriminate among those who so used it. It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a

part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be "disconnected from any advertisement." All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws.

It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.

Without further discussion, we hold that the provision against the use of representations of the flag for advertising articles of merchandise is not repugnant to the Constitution of the United States. It follows that the judgment of the State court must be affirmed.

It is so ordered.

Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.